KUAH KOK KIM & ORS.

v.

CHONG LEE LEONG SENG CO. PTE. LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
LP THEAN J
CHAO HICK TIN J
[CIVIL APPEAL NO. 85 OF 1989]
30 APRIL 1991

COMPANY LAW: *Oppression - Minority shareholders - Winding up petition - Section 216 of the Companies Act [Sing] - Object and intention - Various other remedies specified - Applicability of Companies (Winding Up) Rules 1969 [Sing] - Whether abuse of process - Whether defect could be cured - Irregularity or nullity - Procedural non-compliance - Rules of Supreme Court 1970 [Sing], O. 88, rr. 5 & 7.*

The appellants, who were minority shareholders of the company C, instituted proceedings under s. 216 of the Companies Act (the Act) seeking an order for the winding up of C, for the appointment of liquidators or for the removal of 6 directors of C. The basis of the application was that the directors had conducted the affairs of C in a manner oppressive to one or more of the members of the company including the appellants. The petition was presented as a winding up petition under the Companies (Winding-Up) Rules 1969 (the Rules). This petition was advertised pursuant to r. 24 of the Rules.

The appellants subsequently also applied by way of summons-in-chambers for an order for appointment of provisional liquidators and managers under s. 272 of the Act.

C applied under O. 18 r. 19(1) and/or the Court's inherent jurisdiction for the dismissal of the petition on the ground of abuse of process. Chan Sek Keong J held that the petition was improperly presented as a winding up petition under the Rules as the proceedings ought to have been commenced by way of petition pursuant to O. 88 of the Rules of the Supreme Court 1970 (RSC). The petition was ordered to be struck out; hence this appeal.

The issues before the Court were:

(a) whether the Rules apply to the proceedings taken out by the appellants under s. 216 of the Act in which a winding up order against C was sought;

(b) if the Rules are not applicable, whether the petition was a nullity or irregularity as it was filed as a companies winding up petition; and

(c) if it is an irregularity, whether in all the circumstances of the case, the error could have been remedied and the petition ought not have been struck out.

Held:

[1] The object of s. 216 is to put an end to or remedy the matters complained of and in giving effect to that section, the Court will consider all the circumstances and grant an appropriate remedy. It is clearly not the intention of the legislature that the Court in exercising its discretion under this section ought to grant the remedy of winding up only if the other remedies are inadequate or ineffectual for the purpose.

[2] Proceedings instituted under s. 216 are not in truth winding up proceedings even if a winding up order is expressly asked for in such proceedings. The remedy sought for by the shareholder and which is eventually granted by the Court does not determine the nature of the proceedings.

[3] The combined operation of rr. 5 and 7 of O. 88 of RSC enable a shareholder to commence proceedings under s. 216 and the provisions prescribe a procedure for making an application for relief under s. 216 which is no different from the procedure for making an application to Court for reduction of share capital of a company. Order 88 rr. 5 and 7 of the RSC apply to such proceedings irrespective of whether or not a winding up order is asked for. The rules do not apply to an application made under s. 216 of the Act.

[4] The only defect in these proceedings was that the petition bears the heading or title of a companies winding up petition; this failure to comply with a procedural requirement is an irregularity which was not so fundamental or serious that it ought not to be remedied under O. 2 r. 1 of the RSC. Such an amendment would not cause injustice to C or its directors.

[5] Although the Rules and RSC are mutually exclusive in their operational effect, such exclusivity would not prevent the operation of O. 2 r. 1(1) to cure the formal defect in this case.

[Appellants' appeal allowed.]

Cases referred to:
Bernstein & Anor. v. Jackson & Ors. [1982] 1 All ER 806
Harkness v. Bell's Asbestos and Engineering Ltd. [1967] 2 QB 729
Re Chong Lee Leong Seng Co. (Pte.) Ltd. [1989] 3 MLJ 343
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1978] 2 MLJ 227

Legislation referred to:
Companies Act [Sing], ss. 216(2), 260, 259, 261, 267, 272, 334, 335
Companies Act 1951 [Aust], s. 186
Companies Act [Ghana], s. 218
Companies Act 1948 [UK], s. 210
Rules of the Supreme Court 1970 [Sing], O. 2 r. 1, O. 18 r. 19, O. 88 r. 5, O. 88 r. 7, O. 1 r. 2(2)

For the appellants - Michael Khoo
For the respondents - Davinder Singh

JUDGMENT

LP Thean J:

The appellants are minority shareholders of the company, Chong Lee Leong Seng Co. (Pte.) Ltd. (the company). On 17 March 1989 they instituted proceedings under s. 216 of the Companies Act (Cap. 50) by way of a petition filed in Companies Winding Up Petition No. 77 of 1989 seeking an order that the company be wound up under the Companies Act and that Wong Tui San and Ee Hock Leong of Ernst & Whinney be appointed liquidators of the company, or alternatively an order that six directors of the company (named therein) be removed as directors, that Wong Tui San and Ee Hock Leong be appointed managers of the company, and that certain decisions of the board of directors of the company be cancelled. The complaints of the appellants were that the directors (i) had conducted the affairs of the company in a manner oppressive to one or more of the members of the company, including the appellants, and/or in disregard of the appellants' interests as members of the company; (ii) were exercising their powers as directors of the company in a manner oppressive to one

or more of the members of the company including the appellants, and/or in disregard of the appellants' interest as members of the company, and/or (iii) had acted and/or were threatening to act in a manner which unfairly discriminated against or was otherwise prejudicial to one or more of the appellants as members of the company. The petition was presented as a winding up petition under the provisions of the companies (Winding Up) Rules 1969, and in accordance with r. 23 the Registrar appointed 21 April 1989 as the date for the hearing of the petition.

Almost immediately after the filing of the petition, the appellants took out an application by way of Summons-in-Chambers No. 1515 of 1989 for an order for appointment of provisional liquidators and managers of the company under s. 272 of the Companies Act. The application was supported by an affidavit filed by Kuah Kok Kim, one of the appellants. On 8 April 1989, Lau Kiat Bin, one of the directors of the company, filed a voluminous affidavit exhibiting no less than 46 Exhibits, and the affidavit was expressed to contest both the petition and the application for provisional liquidators and managers. On the same day, five affidavits were filed by five other directors respectively, namely, Lau Huang Nam, Kuah Hong Seng, Tan Say Joo, Kuah Leong Bee and Wong Shueng Sze, each confirming that the events referred to in the affidavit of Lau Kiat Bin, in which each of them was involved, were true and accurate and adopting the same in their entirety. In addition, two further affidavits were filed on behalf of the company, namely, the affidavit of Leena Sankaran who is a solicitor in the firm of M/s. Drew & Napier, the solicitors for the company, and the affidavit of Yip How Wong, who is a director of J.A.C. Secretaries Pte. Ltd. which provided secretarial and management services to the company. These two affidavits exhibited various documents and sought to support the matters or events referred to in Lau Kiat Bin's affidavit. However, the application for appointment of provisional liquidators was not heard in view of the order made subsequently which is the subject of this appeal.

On 7 April 1989, the petition was advertised pursuant to r. 24 of the Companies (Winding Up) rules 1969. About one week later, on 13 April 1989, the company took out an urgent application for an order under s. 259 of the Companies Act. The application was heard on the same day and it was ordered that all payments made by the company and on its behalf including payments out of the company's bank accounts and all other transactions and dispositions of property by and on behalf of the company and in the ordinary course of business up to and including the date on which the petition was disposed of should not be avoided under the provision of s. 259 of the Companies Act. It was the view at that time that an order under that section was necessary, as the petition had been advertised as a winding up petition, and, presumably, in consequence, the company was encountering difficulties with its bankers and customers in carrying on its business. Section 259 of the Act provides:

> 259. Any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

After having obtained that order, the company on 14 April 1989 took out an application by way of Summons-in-Chambers No. 2136 of 1989 for an order that pursuant to O. 18 r. 19(1) and/or the inherent jurisdiction of the Court the petition be struck out and dismissed on the ground that the petition and/or the proceedings instituted by the appellants thereunder constituted an abuse of the process of the Court. In support of the application, an affidavit was filed by Lau Kiat Bin on the same day. The abuse complained of consisted of (i) the

application for appointment of provisional liquidators and managers and (ii) the advertisement of the petition appearing in the edition of the "Straits Times" on 7 April 1989. The application was resisted by the appellants. It came on for hearing before Chan Sek Keong J, who held that the petition was improperly presented as a winding up petition under the Companies (Winding Up) Rules 1969, as the proceedings ought to have been properly commenced by way of petition pursuant to the provisions of O. 88 of the Rules of Supreme Court 1970, and he ordered that the petition be struck out: *Re Chong Lee Leong Seng Co. (Pte.) Ltd.* [1989] 3 MLJ 343. Against that decision, this appeal is now brought.

There are three issues before us: (i) whether the Companies (Winding Up) rules 1969 apply to the proceedings taken out by the appellants under s. 216 of the Companies Act in which a winding up order against the company was sought; (ii) if such rules are not applicable, whether the petition having been filed as a companies winding-up petition in Companies Winding Up No. 77 of 1989 is a nullity or an irregularity, and (iii) if it is an irregularity, whether in all the circumstances of the case the error could have been remedied and the petition ought not to have been struck out.

We turn to the first issue, and it is convenient at this stage to set out in full the provisions of s. 216 of the Companies Act, which are as follows:

> 216. (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
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> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
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> (2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may:
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> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
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> (b) regulate the conduct of the affairs of the company in future;
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> (c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;
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> (d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
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> (e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
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> (f) provide that the company be wound up.
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> (3) Where an order that the company be wound up is made pursuant to subsection (2)(f), the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power, without the leave of the Court, to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within 14 days after the making of the order.

(6) Any person who fails to comply with subsection (5) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding RM1,000 and also to a default penalty.

(7) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transmitted by operation of law as it applies to members of a company; and references to a member or members shall be construed accordingly.

This section first appeared as s. 181 when the Companies Act was enacted in 1967; the Act substantially copied from the Malaysian Companies Act 1965. That section was derived from no less than three sources, namely, s. 210 of the Companies Act 1948 of the United Kingdom, s. 186 of the Australian Companies Act 1951 and s. 218 of the Ghanaian Companies Act. It is not necessary to refer to and examine these legislative sources in any detail; suffice it here to say that s. 216 of our Companies Act differs in material respects from its antecedents and has a wider scope than any of them.

Briefly, this section provides, among other things, a right to a shareholder of a company to apply to Court for relief in circumstances where his rights have been unfairly prejudiced by any oppressive or discriminatory acts or conduct of the directors, and it gives the Court wide powers to make such order as it thinks fit "with a view to bringing to an end or remedying the matters complained of". In particular, no less than six reliefs are specified in s. 216(2), which the Court is empowered to grant, including an order to wind up the company; but, having regard to the wide powers expressly provided therein, these are by no means exhaustive. All these reliefs rank equally and it is not correct to say that the primary remedy under this section is winding up: per Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 MLJ 227 at p. 229. Nor conversely is it correct to say that winding up is granted only if all the other reliefs specified in s. 216(2) are found to be inadequate or ineffectual for the purpose of remedying the matters complained of. With respect, we are unable to agree with the view expressed by Chan Sek Keong J that a Court in Singapore will not wind up a company on the ground of oppression where any of the other reliefs provided in s. 216 is a sufficient remedy to bring to an end the matters complained of. Section 216 confers on the Court an unfettered discretion, and it would not be right to lay down any general rule which might operate to limit or restrict the exercise of such discretion. Whether a Court would or would not grant the remedy of winding up under s. 216 depends on the circumstances of the case. There may be and could be circumstances in which relief other than winding up would put an end to the oppression but nonetheless the Court considers that winding up is a more appropriate remedy. We accept that, as a matter of practicality, in considering whether to grant such a remedy the Court will have to bear in mind the drastic character of winding up, and in this connection we respectfully agree with what Lord Wilberforce said in *Re Kong Thai Sawmill (Miri) Sdn. Bhd*. with regard to winding up as a remedy, at p. 233:

> Winding up is specially mentioned in s. 181(2)(e) of the Companies (the equivalent of s. 216(2)(f) of our Companies Act) as a head of relief which the Court may grant. No limiting conditions are imposed, so that the granting of it is in the discretion of the Court. In exercising this discretion, the Court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under s. 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.

We agree with Chan Sek Keong J that the object of s. 216 is to put an end to or remedy the matters complained of and in giving effect to that section the Court will of course consider all the circumstances and grant what it considers the appropriate remedy. But, it is clearly not the intention of the legislature that the Court in exercising its discretion under this section ought to grant the remedy of winding up only if the other remedies are inadequate or ineffectual for the purpose. On this point it is instructive to compare s. 216 with s. 186 of the Australian Companies Act. The latter provides as follows:

> 186. (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more of the members (including himself) may, or, following on a report by an inspector under this Act, the Minister, may apply to the Court for an order under this section.
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> (2) If the Court is of opinion that the company's affairs are being so conducted the Court may, with a view to bringing to an end the matters complained of:
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> (a) except where para. (b) of this subsection applies, make an order that the company be wound up; or
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> (b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or the members referred to in subsection (1) of this section, but otherwise the facts would justify the making of a winding up order on the grounds that it is just and equitable that the company be wound up, or that, for any other reason it is just and equitable to make an order (other than a winding up order) under this section, make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members by other members or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.
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> (Emphasis is mine)

There, by subsection (2) it is expressly provided that the remedy of winding up would only be granted if the other remedies are not granted; the remedy of winding up ranks as one of last resort.

We agree with the learned Judge that a shareholder seeking relief under s. 216 need not ask for an order to wind up the company, and where he does ask for such relief, whether as a sole or a principal remedy, or as an alternative remedy, the Court may not grant it and instead may grant other relief if it thinks fit. Hence, a shareholder applying or relief under s. 216 may or may not obtain a winding up order against the company, irrespective whether or not such relief is expressly asked for. It is significant to note that subsection (3) of s. 216 provides that where an order for winding up of the company is made under subsection (2), the provisions of the Companies Act relating to winding up shall apply as if the order had been made upon a petition duly presented by the company. Until a winding up order is made, none of the provisions in Part X of the Companies Act, that is provisions relating to winding up of companies, apply. In particular, upon commencement of proceedings under ss. 216,

258, 259, 260, 261, 267, 334 and 335 of the Companies Act, which operate upon commencement of winding up proceedings against a company and which impose grave consequential disabilities on the company, have no application, and the company is not subject to any such disabilities. It is abundantly clear to us that proceedings instituted under s. 216 of the Companies Act are not in truth winding up proceedings - certainly not winding up proceedings under Part X of the Act - even if a winding up order is expressly asked for in such proceedings. The remedy sought for by the shareholder and eventually granted by the Court does not determine the nature of the proceedings. The learned Judge said, p. 346:

> I do not think it matters how the reliefs in a s. 216 (petition) are pleaded. Whether or not a proceeding is a winding up proceeding cannot depend on the manner in which the relief is being sought.

We respectfully agree with this view.

Unlike s. 210 of the Companies Act 1948 of the United Kingdom which by subsections (1) and (5) thereof makes provisions for the procedure to be followed in an application under that section, s. 216 of our Companies Act is completely silent on the question of procedure. This, however, does not pose any difficulty. Order 88 of the Rules of Supreme Court 1970 provides the procedure. First, r. 5 prescribes the mode of commencement of such proceedings and, so far as relevant, is in the following terms:

> 5. The following applications under the (Companies) Act must be made by petition, namely, applications:
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> (h) under s. [216] of the Act for relief in cases of oppression;

Next, r. 7 provides that after the presentation of the petition, the petitioner must take out a summons for directions and on the hearing of such summons the Court may by order give such directions as to proceedings to be taken before the hearing of the petition as it thinks fit, including directions for the publication of notices. Rules 7, in so far as relevant, provides:

> 7. (1) After presentation of a petition by which any such application as is mentioned in r. 5 is made, the petitioner, except where his application is one of those mentioned in paragraph (2), must take out a summons for directions under this Rule.
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> (3) On the hearing of the summons the Court may by order give such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit including in particular, directions for the publication of notices and the making of any inquiry.

The combined operation of these rules enables a shareholder to commence proceedings under s. 216 seeking for the necessary reliefs and bring the subject matter of these proceedings before the Court for hearing and determination. It seems to us that these provisions are sufficiently clear and adequate for the purpose: it prescribes a procedure for making an application for relief under s. 216 which is no different from the procedure for making an application to Court for reduction of share capital of a company with which the legal fraternity is so familiar. There is really no room for confusion as to the relevant rules which would apply in commencing proceedings under s. 216, and there is no question that O. 88 r. 5 and 7 apply to such proceedings irrespective of whether or not a winding up order is expressly asked for.

It is again abundantly clear to us that the Companies (Winding Up) Rules 1969 have no application to an application made under s. 216 of the Companies Act. It was submitted by Counsel for the appellants that by reason of r. 1(2) these rules apply to such an application. Rules. 1(2) provides:

> These rules shall apply to the proceedings in every winding up under the Act of a company which commenced on or after the 29 December 1967, but shall not apply to any company or society of which the winding up had commenced before the aforesaid date, and every such company or society shall be wound up in the same manner as if these rules had not been made.

Counsel also relied on O. 1 r. 2(2) of the Rules of Supreme Court 1970, which provides:

> These rules shall not have effect in relation to proceedings of the kinds specified in the first column of the following Table (being proceedings in respect of which rules may be made under the written law specified in the second column of that Table):
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> Table
>
> | Proceeding | Written Law |
> |---|---|
> | 1. Bankruptcy proceedings | Bankruptcy Ordinance, s. 123. |
> | 2. Proceedings relating to winding up of companies | Companies Act 1967, s. 372 |

A short-shrift to this argument, without being disrespectful to Counsel, is that proceedings under s. 216 are not "proceedings in ... winding up under the Act of a company". Our reasons for this view have been given and we have nothing further to add. In conclusion, we are in entire agreement with the learned Judge that these proceedings should not have been presented as a company's winding up petition, and that the appellants ought to have presented it as an originating petition under O. 88 r. 5(h) followed by a summons for directions under O. 88 r. 7.

We now turn to the second and third issues: whether the defect is a nullity or an irregularity, and if it is an irregularity whether it could and should be remedied. We propose to consider both these issues together. On these issues the learned Judge said, at pp. 348-349:

> I turn now to the third issue, that is whether the petition may be amended to come within the 1970 Rules. Counsel for the petitioners contend that any defect in the proceedings can be cured under O. 2 r. 1. It is not necessary to set out herein the text of the said Rule. What it does is generally to abrogate the distinction between irregularities and nullities.
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> Counsel for the petitioners submits that the non-compliance in the present proceedings is an irregularity which can be cured by amending the title of this petition to that of an originating petition. I do not think this can be done under the 1969 Rules. This is the converse case of *Re United Iron Mining Co. Ltd.* [1970] 1 MLJ 105. Having presented this petition as a winding up petition under the 1969 Rules, the petitioners may only apply to amend the petition under the 1969 Rules or the Act. They cannot rely on a different set of rules to set their petition right as the petition is not governed by those rules. The 1969 Rules and the 1970 Rules are mutually exclusive in their operational effect. Order 2 of the 1970 Rules accordingly does not assist the petitioners.

In regard to the 1969 Rules, r. 191 provides:

> Unfortunately, in my view, the aforesaid Rule is also of no assistance to the petitioners. The Rule cannot be used to change a winding up petition into an originating petition. The defect is a nullity and not an irregularity. As a winding up petition, it will be dismissed *in limine* when it comes on for hearing. No amendment can rectify this defect. Secondly, if the defect were a formal defect or irregularity, I think that substantial injustice has been done to the company by the unavoidable impression given to the public that winding up proceedings have been commenced against the company. In this respect, I do not agree with the argument

of Counsel for the petitioners that there was any waiver by the company of the irregularity by its application to Court for validation orders. So long as the petition remains in the Registry as a winding up petition, the company remains subject to all the statutory disabilities I have already mentioned.

Counsel for the appellants submitted that the defect was an irregularity and should be remedied under O. 2 r. 1 of the Rules of Supreme Court, which provides as follows:

1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to para. (3), the Court may, on the ground that there has been such a failure as is mentioned in para. (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

This rule is identical with the O. 2 r. 1 of the Rules of Supreme Court in England, and in *Harkness v. Bell's Asbestos and Engineering Ltd.* [1967] 2 QB 729 at pp. 735-736, Lord Denning M.R. had this to say with regard to this rule:

This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the Court can and should rectify so long as it can do so without injustice.

That may be the true effect of O. 2 r. 1. Notwithstanding the very wide powers given to Court to remedy non-compliance with the Rules of Supreme Court, there may be failure or non-compliance with the rules which is so fundamental or serious that the Court ought not to exercise its discretion under r. 1 to remedy it: see *Bernstein & Anor. v. Jackson & Ors.* [1982] 1 All ER 806.

In this case, the proceedings were begun by a petition; so the mode of commencement as prescribed by O. 88 r. 1(2) has been followed and is correct. The only defect is that it bears the heading or title of a companies winding up petition and was filed as such in the Registry. The heading or title should have been that of an originating petition and should have been filed as such. There has been a failure to comply with a procedural requirement. Apart from this, there is nothing wrong with the petition as a matter of form. In our judgment, this failure is an irregularity and is not such a fundamental or serious one that it ought not to be remedied under O. 2 r. 1; a slight amendment to the heading or title of the petition would cure the defect.

Such an amendment, in our opinion, would not cause substantial injustice to the company or its directors. True it is, as the learned Judge held, that an unavoidable impression has been given to the public by the publication of the advertisement that winding up proceedings have been commenced against the company. But to persons who know or deal with the company, the impression created probably was that there were internal disputes within the company and not that the company was insolvent or was financially unsound. The difficulties

the company had with its bankers and customers were to a large extent overcome by the order the company obtained under s. 259 of the Companies Act, though such an order was not really necessary in this case. At any rate, if substantial injustice has been caused to the company, it would not be alleviated any more by the drastic remedy of striking out the petition than by the simple remedy of amending it.

We agree that the Companies (Winding Up) Rules 1969 and the Rules of Supreme Court 1970 are mutually exclusive in their operational effect, as the learned Judge held. We do not think, however, that such exclusivity would prevent the operation of O. 2 r. 1(1) to cure the formal defect in this case. In the application before the learned Judge, the respondents invoked the jurisdiction of the Court to strike out the proceedings under O. 18 r. 19 and also under the inherent jurisdiction. If proceedings could be struck out under this rule, logically any defect in such proceedings could be rectified under O. 2 r. 1.

We therefore allow the appeal, set aside the order of the learned Judge and dismiss the application made by way of Summons-in-Chambers No. 2136 of 1989. We further order that the heading or title of the petition and all subsequent cause papers be amended by deleting "Companies Winding Up No. 77 of 1989" and substituting therefor "Originating Petition No. 128 of 1989". (We have ascertained from the Registry that number is available for these proceedings).

On the question of costs, we think that the respondent's application was brought about by the error on the part of the appellants. Though in exercise of our discretion we order an amendment to be made to the proceedings and in consequence dismiss the respondent's application, we think that the respondents were not wholly wrong in making the application. The respondent's arguments that the appellants were wrong in filing the petition as a companies winding up petition succeeded before the learned Judge and we agree with the learned Judge on that point. In the circumstances, the respondents should be entitled to three-quarters of the costs of the hearing before the learned Judge. As for the costs of the appeal, the appellants have failed on the first issue and, in our judgment, should in the circumstances be allowed only two-thirds of the costs of the appeal. We accordingly so order. There will be the usual consequential order for the refund to the appellants or their solicitors of the deposit paid into Court as security for costs.

Also found at [1991] 2 CLJ 1634